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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

JAMES J. SAXON,
COMPTROLLER OF THE CURRENCY, PETITIONER

v.

COMMERCIAL SECURITY BANK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Comptroller of the Currency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on November 18, 1965.

OPINIONS BELOW

The court of appeals issued no opinion other than its judgment (App. A, *infra*, pp. 14–15), which is unreported. The opinion of the district court (App. B, *infra*, pp. 16–25) is reported at 236 F. Supp. 457.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1965 (App. A, *infra*, pp. 14–15). On February 16, 1966, Mr. Justice Fortas extended the

time for filing a petition for certiorari to and including March 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in authorizing the establishment of a branch office by a national bank, the Comptroller of the Currency is bound by a provision of State law that permits a State bank to establish a branch only through the acquisition of an existing bank.

STATUTES INVOLVED

The statutes involved are 12 U.S.C. 36(c) and Utah Code Ann. (1953), § 7–3–6. They are printed in App. C, *infra*, pp. 26–28.

STATEMENT

The law of Utah authorizes State-chartered banks to establish branch offices within the corporate limits of any city or town in the State; but, except in cities of the "first class" (of which the only one is Salt Lake City), a State bank may do so only by taking over an existing bank if there is one located there.[1] Utah Code Ann. (1953), § 7–3–6. Although more than 140,000 people reside in the metropolitan area of Ogden, Utah, the population of the city itself is approximately 70,000, and it is therefore classified under Utah law (Utah Code Ann. (1953), § 10–1–1) as a city of the "second class."

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[1] Where a city or town has branch banking offices, but no principal office of a bank, the "take over" restriction is inapplicable, and new branches may be established there without restriction. *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 390 P. 2d 592.

On or about June 25, 1963, First Security Bank of Utah, a national banking association (hereinafter referred to as the "national bank"), filed an application with the Comptroller of the Currency for authorization pursuant to 12 U.S.C. 36(c) to establish and operate a branch bank within the corporate limits of the City of Ogden, where the bank maintains its principal office. The bank proposed to establish the new branch by opening a new office rather than by purchasing or otherwise taking over an existing bank. On July 18, 1963, Commercial Security Bank (hereinafter referred to as the "State bank"), a Utah banking corporation having its principal place of business plus a branch in Ogden, commenced this action against the Comptroller of the Currency for declaratory and injunctive relief.[2] The State bank alleged that the establishment of the proposed national-bank branch in Ogden would reduce its business and profits and was prohibited by the "take over" provision of Utah bank branching law, which, it contended, is applicable to national banks by virtue of 12 U.S.C. 36(c); that statute permits a national bank (with the Comptroller's approval) to establish branches (1) in the city or town where its main office is located if State law expressly authorizes State banks to do so, and (2) elsewhere in the State if State law so authorizes State banks, and subject to the restrictions on location

[2] On June 9, 1965, the Comptroller informally approved the national bank application, but, owing to the pendency of this action, no certificate was issued.

imposed by State law.[3] The national bank intervened as a party defendant.

On December 18, 1964, the district court issued an opinion and order holding that all restrictions imposed by State law on branch banking are applicable to national banks and enjoining the Comptroller from authorizing the national bank to open a branch office in Ogden (App. B, *infra*, pp. 16–25).[4] The national bank and the Comptroller appealed. The court of appeals, without opinion, affirmed the district court's decision on the authority of *Walker Bank & Trust Co.* v. *Saxon*, 352 F. 2d 90 (C.A. 10), a recent decision also involving the application of a national bank to open a branch office in a Utah city not of the first class.[5] The Tenth Circuit had ruled in that case that "all the state law on branch banking," including the "take over" restriction of Utah law, had been made

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[3] The subsection directly relevant here is § 36(c)(1), which governs "inside" branches—those located within the city where the bank has its principal office, which for the national bank in this case is Ogden. Section 36(c)(2), which governs outside branches, provides that a national bank may, with the Comptroller's approval, establish and operate a branch "at any point within the State" where it is located "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

[4] Initially, the court held that the State bank had standing to bring this action. The Comptroller does not here question that ruling.

[5] A petition for certiorari has been filed in that case by the national bank. *First National Bank of Logan, Utah* v. *Walker Bank & Trust Co.*, No. 875, October Term, 1965. We are this day filing a memorandum in support of the petition in *Logan*.

applicable by 12 U.S.C. 36(c) to the establishment of branches by national banks in Utah.

The national bank in the instant case has filed a petition for certiorari. *First Security Bank of Utah* v. *Commercial Security Bank*, No. 1009, October Term, 1965.

REASONS FOR GRANTING THE WRIT

The Comptroller of the Currency is authorized by 12 U.S.C. 36(c) to permit national banks to establish branch offices within the limits of the city or town where the national bank is located, provided that the establishment of such a branch is expressly authorized to State banks by the law of the State. The single question in this case is whether, by virtue of this provision, the Comptroller's authority over the establishment of national-bank branches is limited by a State statute which permits State banks to establish branches throughout the State but only by taking over an existing bank. We shall briefly explain why we think the court below erred in holding that the Comptroller's authority is so limited; first, however, we suggest why the question is an important one meriting review by this Court.

1. At least twelve States besides Utah, including such important banking areas as New York, Pennsylvania, and Massachusetts, have provisions governing branch banking similar to that in suit here.[6] That is, these

[6] See Ann. Laws of Mass., C. 172, §§ 45, 46; Conn. Gen. Stat. Ann. (1958 rev.), § 36-59; 2 Ky. Rev. Stat. § 287.180; Me. Rev. Stat. (1963 Cum. Supp.), c. 59, §§ 19-c, 124; Miss. Code, §§ 5228, 5229, 5232; N.H. Rev. Stat. Ann. (1965 Supp.), 384-B:2; N.J. Stat. Ann., § 17:9A-19; 4 McKinney's Consol. Laws of N.Y.

States authorize banks chartered by them to establish branch offices but (at least in some circumstances) only by acquiring existing banks. If the decision below stands, therefore, in all of these States the Comptroller of the Currency will be barred from approving the establishment of national-bank branches save through acquisition.[7] And not only is the impact of the decision below likely to be widespread in terms of the number of States affected, but, within each of these States, the structure of banking competition will be profoundly affected. The State-law provisions in question are highly anticompetitive. By freely permitting branching by acquisition, they foster the development of large and powerful banks with numerous offices throughout the State; at the same time, by forbidding branching through the establishment of new offices, they strictly limit the number of competitors in each local banking market.[8] The inevitable tendency is to promote concentration and weaken competition. If this pattern is obligatory upon the national as well as the State banks within each of these States, its adverse competitive effects will be greatly magnified.

Ann., §§ 105, 600, 601–a; Purdon's Pa. Stat. Ann., Tit. 7, § 819.204.1; S.D. Code of 1939 (1960 Supp.), § 6.0402; Code of Va., Tit. 6, Art. 3, Sec. 6–26 (1964 Cum. Supp.); Rev. Code of Wash. Ann. § 30.40.020.

[7] We point out *infra*, p. 7 and n. 10, that, in principle, the decision below is in conflict with that of another circuit. Since, however, any State bank challenging the Comptroller's authorization of a national bank branch may sue the Comptroller in the District of Columbia (see 28 U.S.C. 1391(e)(1)), it is evident that a further conflict with the decision below is unlikely to arise and that the decision—unless reversed—will, for all practical purposes, be binding in all of the States which have a similar restriction.

[8] See, further, p. 10, *infra*.

The general question involved in this case—the extent to which State-imposed branching limitations are made applicable by 12 U.S.C. 36(c) to the national banks—has been extensively litigated in recent years;[9] lacking guidance from this Court (which has never had occasion to consider the scope of § 36(c)), the lower federal courts have reached sharply conflicting results. Thus, the Fourth Circuit in a recent case adopted a view—completely at variance with that of the Tenth and District of Columbia Circuits—that only geographic restrictions are incorporated in § 36(c). *First National Bank of Smithfield, North Carolina* v. *Saxon,* 352 F. 2d 267 (C.A. 4); accord, *Attorney General* v. *Michigan National Bank,* 298 Mich. 417, 299 N.W. 129.[10] The conflict and uncertainty that have developed in the interpretation of this important fed-

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[9] Besides the cases cited herein, see, *e.g.*, *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830; *Hoosier State Bank* v. *Saxon*, Civ. No. 4111, N.D. Ill., Dec. 14, 1965.

[10] In *Smithfield*, a competing bank challenged the Comptroller's authorization of the establishment by a national bank of a branch outside its home municipality under 12 U.S.C. 36(c)(2) (see p. 4, n. 3, *supra*). The bank contended that Section 36(c) incorporates all of the requirements of State law as to branching, and, hence, that the Comptroller was required to ascertain "to his satisfaction * * * that the establishment of such [branch] * * * will meet the needs and promote the convenience of the community," since the law of the State in question (North Carolina) requires the State banking commissioner to make such in determination before approving any branch application. The court rejected the contention, holding that only geographic restrictions imposed by the State on branching are applicable to national banks. 352 F. 2d at 271. This reading would equally exclude from the scope of State power over national-bank branching the take-over requirement of Utah law, which is in no sense a geographical restriction on branching.

eral statute furnish an additional reason for the Court to review this case.

2. The language and design of 12 U.S.C. 36(c) support the view of the Comptroller that the only State branching limitations binding upon the Comptroller are those geographical in character.[11] If the State forbids branching altogether or confines it to specific localities (*e.g.*, the county where the bank has its head office plus adjacent counties), Section 36(c) expressly provides that the Comptroller, in authorizing the establishment of national-bank branches, is bound by the restriction. But if, as in the present case, the State permits branching in the area where the national bank desires to establish a branch, any other limitations it may impose—for example, on the manner of branching (*i.e.*, by acquisition of an existing bank rather than by opening a new office)—are not binding upon the Comptroller.

Certainly, there is no basis in the language or legislative history (see, *e.g.*, S. Rep. No. 473, 69th Cong., 1st Sess., pp. 8, 10) for the view of the Tenth and District of Columbia Circuits that "all state law on branch banking" (p. 4, *supra*) is applicable to national banks. And even if Section 36(c) incorporates by implication any State limitations on branching by national banks which go beyond the strictly geographic, we submit that Congress did not adopt a nonterritorial restriction, such as that at bar, which (1) is inconsistent with fed-

[11] This Court has described the State-law restrictions applicable to national banks as "geographical limitations." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 328; *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411, 413, n. 1. State minimum-capitalization requirements are also expressly made binding on the Comptroller; they are not in issue here.

eral public policy in the banking field and (2) appears not even to express State policy on the permissibility of branch banking. In so arguing, we leave open the possibility that some limitations that do not appear strictly geographical may be within the scope of § 36(c) (for example, a State restriction upon the number of branches a bank may have in a particular area), in view of Congress' evident design to afford protection to State branch-banking policies. But we think the statutory language—which in terms subjects the Comptroller only to geographical restrictions imposed by State law—can in no event be stretched to embrace a restriction like the one in suit, which is neither geographic in nature, nor compatible with general federal banking policy, nor in fact an expression of State branching policy of the kind Congress wished to protect.

Federal policy strongly favors competition among banks as a method of ensuring adequate banking services, and, concomitantly, prohibits mergers or acquisitions which are likely to harm competition in banking. Thus, bank stock acquisitions, since they are fully subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, are forbidden where the effect may be "substantially to lessen competition." See *Transamerica Corp.* v. *Board of Governors,* 206 F. 2d 163 (C.A. 3). In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, this Court held that the same strict test was applicable to bank mergers. In a recent amendment to the Bank Merger Act (the original Act had made "effect * * * on competition" one of several factors to be considered by the banking agencies in passing on an appli-

cation for approval to merge (12 U.S.C. 1828(c)), Congress modified the ruling of *Philadelphia Bank;* but the new law continues to subject bank mergers to a strict competitive standard, under which a merger "whose effect in any section of the country may be substantially to lessen competition" is forbidden unless its adverse competitive effects are "clearly outweighed" by considerations of public need and convenience. Pub. L. 89–356, enacted February 21, 1966, § 1, amending 12 U.S.C. 1828(c) (5) and (7). And bank holding companies are strictly regulated to ensure "the preservation of competition in the field of banking." Bank Holding Company Act of 1956, § 3(c), 12 U.S.C. 1842(c); see *First Wisconsin Bankshares Corp.* v. *Board of Governors,* 325 F. 2d 946 (C.A. 7).

The consistent and firm congressional policy against anti-competitive bank acquisitions is antithetical to the kind of branching restriction imposed by the Utah provision in suit here. By permitting banks to branch throughout the State by acquiring existing banks, Utah fosters the growth of large and powerful banks and the elimination by absorption of independent banking units, thereby promoting concentration. At the same time it largely precludes a vital antidote to concentration—new entry. *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 174. Under this provision of Utah law, a State bank cannot penetrate a concentrated local banking market by establishing a branch office there. It may enter only by taking the place of one of the existing banks—a method of entry that leaves the concentrated structure of the market unchanged. If this restrictive principle is limited to banks chartered by the State, the national banks of

Utah remain as an important source of new competition. If, on the other hand, it binds the national banks as well, the adverse competitive consequences of the State restriction lack this important check. The Comptroller may either authorize branching by acquisition—which may promote concentration [12] and is unlikely to lessen it—or forbid it altogether—thereby stifling a possibly critical source of new entry. But he cannot authorize the opening of new branch offices. Entry is thus severely restricted.[13] In view of these anti-competitive consequences, it seems plain that Congress could not have intended 12 U.S.C. 36(c) to be so applied.

Our remaining ground for arguing that Utah's limitation of branching to the take-over of existing banks is not made applicable by 12 U.S.C. 36(c) to national banks is that such a limitation does not, in fact, express State policy toward the permissibility or extent of branch banking. Congress limited the branching powers of the national banks out of deference to strongly held feelings in many States against branch banking. Some States forbade it altogether; others limited it territorially; still others prescribed the maximum number of branches in a given location. In each case the State was expressing a restrictive policy toward branching. The Utah provision in issue here expresses

[12] That would be the case here. There are only four banks in Ogden, so that if the national bank were required to take over one of the existing banks, the number would be reduced to three.

[13] He can, to be sure, charter a completely new national bank. But entry into a new market by an existing banking company through the establishment of a branch office is ordinarily more feasible than the formation of a new bank. See Note, 71 Yale L.J. 502, 514–515 (1962); cf. *United States* v. *Penn-Olin Chemical Co.*, *supra*.

no such policy. It does not seek to maintain a structure of decentralized unit banking, to limit the scope of branching, or to prevent the growth of large multi-unit banks, but, rather, looks with apparent equanimity upon the spread of branch banking.[14]

Utah insists only upon a certain method of branching—by acquisition. By forbidding banks to open new branch offices, the State limits the total number of bank offices in cities that have unit banks (see p. 2, n. 1, *supra*), main and branch. This is a policy rooted in concern with the number of banking outlets in such cities, not with whether or to what extent it is desirable to permit banks to have branches. There is no indication that Congress intended that such a policy would also bind the national banks of a State. See H. Rep. No. 83, 69th Cong., 1st Sess., p. 7. On the contrary, since the Comptroller in chartering new national banks is not required to follow State law, it seems plain that Congress did not intend to subject the Comptroller to State policy with respect to the total number of bank offices, State and national, to be permitted in each State or in particular areas of the State.

In other words, the policy Congress wished to protect was the State's judgment on whether, where, and, perhaps, in what number branches were to be permitted, and not its judgment on the permissible methods or procedures of branching. Thus, a national bank clearly need not obtain the approval of the State banking commissioner before opening a branch, though

[14] For example, Walker Bank and Trust Co., the State bank involved in the *Logan* case (No. 875, this Term), has 14 branches throughout the State.

that is the procedure required of a State bank. *Attorney General* v. *Michigan National Bank, supra.* Nor, if State law requires that before approving a branch application the State banking commissioner must determine that the opening of the branch would not adversely affect the profits of existing banks, must the Comptroller of the Currency therefore make a similar determination in passing upon a national bank's application for approval to branch. Cf. *First National Bank of Smithfield, North Carolina* v. *Saxon, supra.* Essentially the same issue is presented here. The State permits branching so long as the total number of banking outlets in cities that have unit banks is not thereby increased, a limitation evidently designed to protect the profit position of existing banks. See *Walker Bank & Trust Co.* v. *Taylor,* 15 Utah 2d 234, 237, 390 P. 2d 592, 594. Since this is a limitation upon the methods or procedures of branching, rather than upon the extent to which branching should be permitted, it is not a limitation upon national banks.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
DAVID L. ROSE,
KATHRYN H. BALDWIN,
Attorneys.

MARCH 1966.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

SEPTEMBER TERM, 1965

Civil 1815–63, Filed November 18, 1965,
Nathan J. Paulson, Clerk

No. 19356

FIRST SECURITY BANK OF UTAH, N.A., APPELLANT

v.

COMMERCIAL SECURITY BANK, APPELLEE

No. 19357

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT

v.

COMMERCIAL SECURITY BANK, APPELLEE

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Wright and Tamm, Circuit Judges.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is hereby affirmed. *Walker Bank & Trust Company* v. *James*

J. Saxon, Comptroller of the Currency, et al., decided October 26, 1965, No. 7981, C.C.A. Tenth Circuit.

It is further ORDERED by the court that all parties bear their own costs on these appeals.

Per Curiam.

Dated: November 18, 1965.

APPENDIX B

United States District Court for the District of Columbia

C.A. NO. 1815–63, FILED DECEMBER 18, 1964, HARRY M. HULL, CLERK

COMMERCIAL SECURITY BANK, PLAINTIFF

v.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, DEFENDANT

FIRST SECURITY BANK OF UTAH, N.A., INTERVENOR-DEFENDANT

Memorandum and Order

This matter came before the Court on the motion to dismiss filed by defendant Comptroller and the cross motions for summary judgment of Intervenor and Plaintiff.

The relevant facts are not in dispute and can be stated as follows:

Plaintiff, a state bank, and Intervenor, a national bank, each have their principal office and one branch in the city of Ogden, Utah. Two other state banks have their main offices in Ogden, the Bank of Utah and the Bank of Ben Lomand. Since Ogden has a population of between 30,000 and 90,000 persons, it is classified as a city of the "second class" by the Utah Bank Statute (Utah Code Ann., Title 10, Chap. 1, Sec. 1 (1953, as amended)).

On June 25, 1963, the First Security Bank, Intervenor, filed an application with the Comptroller of the

Currency, pursuant to Title 12, United States Code, Section 36(c), requesting permission to establish an additional branch office in Ogden. The requested branch would be in addition to the four main bank offices and two branches presently in existence in Ogden. Shortly thereafter, on July 18, 1963, the Commercial Security Bank brought this action against the Comptroller, seeking a declaratory judgment that approval of the branch application would violate 12 U.S.C.A. § 36, and an injunction to restrain the Comptroller from issuing the certificate evidencing approval of the branch. In addition, plaintiff sought preliminary injunctive relief pending disposition of the case.

Judge Curran on July 19, 1963, issued a temporary restraining order prohibiting the Comptroller from issuing a certificate of authority to First National. Prior to the expiration date of that order, on July 26, 1963, counsel for Commercial Security and the Comptroller filed a Stipulation with the Court by which it was agreed:

> * * * that the Comptroller of the Currency will issue no certificate of authority to the First Security Bank of Utah until the District Court has heard Commercial Security Bank's pending motion for a preliminary injunction * * * that if counsel for the Comptroller of the Currency notifies James F. Bell, Esq., of the Comptroller's intention to issue the certificate, Commercial Security will apply to the Court for the earliest possible hearing on its pending motion for preliminary injunction.

On June 9, 1964, the Comptroller notified the First Security Bank of Utah that its branch application had been approved, but the Comptroller has not, as yet, notified counsel for Plaintiff of his intention to issue the certificate of authority.

The First Security Bank was granted leave to intervene as a party defendant on June 26, 1964.

At the outset, the Comptroller contends that the Commercial Security Bank has no standing to bring this suit. The contention can be disposed of by reference to the uncontroverted affidavit of the president of plaintiff bank that if the certificate of authority is issued to the First Security Bank, plaintiff will sustain damage to its business and profits of upwards of fifty thousand dollars a year and plaintiff would have no adequate remedy at law, and by the following holding of our Court of Appeals in *Whitney National Bank* v. *Bank of New Orleans and Trust Company,* 323 F. 2d 290, 300 (C.A.D.C., 1963), cert. granted 376 U.S. 948:

> The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters.

The Comptroller further contends that his determination, based upon his statutory interpretation of 12 U.S.C. § 36(c), should be upheld by this Court unless it is clearly unreasonable. Whatever be the merits of this contention, it is clearly not the law in this Circuit. In both *Commercial State Bank of Roseville* v. *Gidney,* 174 F. Supp. 770, 778, affirmed per curiam 108 U.S. App. D.C. 37, 278 F. 2d 871 (1960), and the *Whitney National Bank* case, *supra,* at page 300, the Court stated, "* * * there is no discretion to unlawfully issue a certificate.", and went on to an independent interpretation of 12 U.S.C. § 36(c) and the applicable state law.

The sole question before this Court is whether the Comptroller of the Currency has the statutory authority to grant a certificate to First Security Bank of Utah, N.A., for the establishment of a new branch in the city of Ogden, Utah.

The applicable statutory law primarily involved is clause (1) of Title 12, U.S.C. § 36(c) (1927, as amended), which provides:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, *if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;* * * * [Emphasis supplied.]

Utah Code Ann., Title 7, Chap. 3, Sec. 6 (1953, as amended), provides as follows:

> Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch *until such bank shall have been in operation as such for a period of five years.* [Emphasis supplied.]

As stated above, Ogden, Utah, is not a city of the "first class," and there are already located in Ogden four main bank offices and two branch banks. It is clear to this Court at the outset that a state bank

would be prohibited from opening a branch in Ogden unless it took over one of the existing banks which had been in operation for at least five years. Thus, if a state bank had applied to the Utah Bank Commissioner for a branch in Ogden under the same conditions which the First Security Bank applied to the Comptroller in this case, the application would clearly have been denied.[1] The question before this Court, therefore, has been narrowed down to whether or not clause (1) of 12 U.S.C. § 36(c) requires the Comptroller to apply to the establishment of national bank branches exactly the same statutory standards as apply to the establishment of state bank branches.

The defendants argue that if it is at all possible for a state bank to establish a branch in the city in question, then the Comptroller may approve a branch for a national bank, whether or not the national bank meets the specific requirements of a state law which would be applied to the state bank. The plaintiff, on the other hand, argues that the Comptroller must apply the same statutory standards as would be applied to a state bank.

In *Commercial State Bank of Roseville* v. *Gidney, supra,* an opinion affirmed by our Court of Appeals, Judge Youngdahl of this Court held that indeed it was "* * * the apparent purpose of Congress to have *exactly* the same standards—state law—apply to the establishment of national bank branches as apply to the establishment of state bank branches" (at

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[1] A recent decision of the Supreme Court of Utah, *Walker Bank & Trust Co.* v. *Taylor*, 390 P. 2d 592 (1964), construed the Utah statute with regard to Provo, Utah, which, like Ogden, is a city of the "second class." The court there held that under the Utah branch statute, *de novo* branching by a State bank was prohibited in a city of the "second class" even when it was the *only* unit bank in the city.

p. 775). Judge Youngdahl applied a Michigan state court case in granting a preliminary injunction against the Comptroller restraining him from issuing a branch certificate to a national bank in Michigan. The holding was in terms of § 36(c) generally, though the provision involved in that case, set out in clause (2) of § 36(c), deals only with branches outside of the city in which the main office of the bank is situated.

On the other hand, the learned Judge Christensen of the United States District Court of Utah, Northern Division, recently held that the Comptroller is *not* held to specific conditions of Utah law in granting branches to national banks under clause (1) of § 36(c), that the granting of express authority for branch banking was all that is necessary for the Comptroller to authorize intra-city branch banking by a national bank. *Walker Bank & Trust Co.* v. *Saxon,* 234 F. Supp. 74 (1964). In that case, the defendant national bank, located in a "second class" city, as is the situation in the instant case, was not required to take over an existing bank in order to establish a new branch. The *Commercial Bank of Roseville* case, *supra,* as well as other cases emphasizing the controlling effect of the conditions specified by state law, were distinguished as constructions of subsection (c), clause (2). Judge Christensen held that Congress did not intend to apply the same conditions to clause (1) as it did to clause (2) of subsection (c), and he justified this distinction by the difference in language between the two clauses and by reference to legislative history of the enactments of clause (1) in 1927 and of clause (2) in 1933.

After a careful consideration of Judge Christensen's opinion, which seems to be directly in point with the case at hand, and with due deference and respect for its learned brother, this Court feels im-

pelled to reach a different conclusion as to the construction to be given to clause (1) of § 36(c).

It seems clear to the Court that, in order for the "dual banking system" of the United States, consisting of state chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21–213), to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress has recognized this need for competitive equality in a manner that protects the state banks and national banks at the same time. In many important areas of the National Bank Act, Congress has incorporated state law as the standard for national banks.[2] In this manner, states are permitted to control national banks to a great extent, but the states must apply the same controls to state banks as they do to the national banks.

Prior to 1927, however, there was a serious inequality between state and national banks in the important area of branching. There was no provision for branches in the National Bank Act, and the Supreme Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, national banks had no branch authority whatever. *First National Bank of Missouri* v. *Missouri*, 263 U.S. 640 (1924). Many states at that time did allow branching, however, and as a result, the competitive situation was so imbalanced

[2] 12 U.S.C.A. §§ 36(c), 51, 85, 92a(a), and 214c.

that the Comptroller in his 1924 report (Government Printing Office), stated, at page 4:

> The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city branching in my opinion involves the question of the perpetuation of the national banking system.

This situation was the background for the enactment of the McFadden Act of 1927, part of which is now § 36(c), clause (1). That statute also amended the Federal Reserve Act to prohibit new branches outside the corporate limits of the municipality in which the main office was located to state banks which were members of the Federal Reserve System. The purpose of the Act, and this is borne out by a study of the legislative history, was obviously to correct the competitive imbalance. The Banking Act of 1933 removed the above restriction on state member banks and in addition enacted what is now clause (2) of 13 U.S.C.A. 36(c) (1933, as amended) set out below:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: * * * (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to locations imposed by the law of the State on State banks * * *.

In spite of the difference in the language of clauses (1) and (2) of subsection (c), this Court feels that the purpose of each was to establish competitive equality, and that the two provisions should, therefore, be interpreted in the same manner.

Thus, this Court feels, in light of the *Commercial State Bank of Roseville* case, *supra*, that it is bound to hold that the exact standards of the Utah branching law must be applied to the First Security Bank of Utah, N.A., and that the Comptroller does not possess the statutory authority to authorize the branch in question.

Even if it were not so bound, however, the Court feels that it would come to the same decision in this case. If the Comptroller were permitted at this time to authorize branches for national banks when other banks in the city in question were not at the time and under the same conditions permitted by state law to branch, the Court feels that the purpose of Congress in enacting clause (1) of subsection (c) would not be met. In fact, the grave competitive imbalance which existed before 1927 would only be shifted to the detriment of state banks. Of course, states could prevent this situation by liberalizing their branching laws, but the Court does not feel that this pressure on state legislatures was intended.

Thus, the Court will grant the declaratory judgment that the issuance by the defendant, Comptroller of the Currency, of his certificate evidencing his approval and authorization of the establishment and operation by First Security Bank of Utah, N. A., of Ogden, Utah, of a branch on Harrison Boulevard between 30th and 36th Streets, Ogden, Utah, would constitute a violation of 12 U.S.C.A. § 36. The Court will also enjoin the defendant Comptroller of the Currency from issuing the above certificate of authority.

Accordingly, there being no material issue of fact, and in light of the above opinion, it is by the Court this 18th day of December, 1964,

ORDERED, that the Motion to Dismiss filed by defendant Comptroller of the Currency be, and the same hereby is, denied;

ORDERED, that the Motion for Summary Judgment filed by the Intervenor-Defendant, First Security Bank of Utah, be, and the same hereby is, denied; and further

ORDERED, that the Motion for Summary Judgment filed by the Plaintiff, Commercial Security Bank, be, and the same hereby is, granted.

IT IS FURTHER ORDERED, that the defendant Comptroller of the Currency be, and he hereby is, enjoined from authorizing the establishment of the branch bank by the First Security Bank of Utah, N. A., which is the subject matter of this cause of action.

LEONARD P. WALSH,
Judge.

APPENDIX C

United States Code, Title 12, Sec. 36(c), as amended, provides:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing busines incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preced-

ing sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

Utah Code Annotated, 1953, Sec. 7–3–6, as amended, provides:

7–3–6. Business conducted at banking house—Branching of offices—Violation of section a misdemeanor.—The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point

where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

The term "branch" as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.

Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may reasonably require. No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office. The bank commissioner may, at his discretion, hold a public hearing on any application to establish a branch. He shall give notice of such hearing by publication in three successive issues in a newspaper of general circulation in the county in which the branch is to be established. The decision of the bank commissioner granting or denying an application to establish a branch shall be in writing, state the reasons therefor, and shall be mailed to the applicant and all protestants. The bank commissioner may by order permitting the establishment of such branch or office designate and limit the character of work and service which may therein be performed.

No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof.

Any corporation or officer thereof violating any of the provisions of this section is guilty of a misdemeanor.

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